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SEP 02 2008

OFFICE OF PETITIONS

In re Application of
Wayne R. Arden :
Application No. 10/757,730 : DECISION ON
Filed: January 13, 2004 : PETITION
Title: Apparatus for Supporting the :
Back :

This is in response to the petition to revive under 37 CFR 1.137(a),
filed August 8, 2008.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted
within **TWO (2) MONTHS** from the mail date of this decision. The
reconsideration request should include a cover letter entitled
"Renewed Petition under 37 CFR 1.137(a)". Extensions of time under 37
CFR 1.136(a) are permitted.

The above-identified application became abandoned for failure to
timely file a reply to the non-final Office action mailed July 16,
2007. This Office action set a shortened statutory period for reply
of three (3) months. No extensions of time under 37 CFR 1.136(a) were
obtained. Accordingly, the above-identified application became
abandoned on October 17, 2007. A Notice of Abandonment was mailed on
January 24, 2008.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1)
the reply required to the outstanding Office action or notice, unless
previously filed; (2) the petition fee set forth in 37 CFR 1.17(1);
(3) a showing to the satisfaction of the Commissioner that the entire
delay in filing the required reply from the due date for the reply
until the filing of a grantable petition pursuant to this paragraph
was unavoidable; and (4) any terminal disclaimer (and fee as set
forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). The
instant petition lacks items (3) and (1).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."¹

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.²

With respect to requirement (3) above, Petitioner states that his counsel "closed his practice and abandoned all of his clients".

The Patent and Trademark Office must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant, and applicant is bound by the consequences of those actions or inactions. Link v. Wabash, 370 U.S. 626, 633-34 (1962). Specifically, petitioner's delay caused by the mistakes or negligence of his voluntarily chosen representative does not constitute unavoidable delay within the meaning of 35 USC 133. Haines v. Quigg, 673 F. Supp. at 317; Smith v. Diamond, 209 USPQ 1091 (D.D.C. 1981); Potter v. Dann, 201 USPQ 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (Comm'r Pat. 1891).

Accordingly, the entire period of delay in the above-identified application can not be characterized as "unavoidable".

With respect to requirement (1), Petitioner has not submitted a reply to the July 16, 2007 Office action. A copy of that Office action is enclosed for petitioner's convenience.

Furthermore, petitioner has not submitted a Change of Correspondence Address. The Office will mail all correspondence to the above address of record, until such time as appropriate instructions are received to the contrary. A Change of Correspondence Address form is enclosed. A courtesy copy of this decision is being mailed to the address listed on the petition.

¹ In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

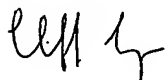
While the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable, petitioner is **not** precluded from obtaining relief by filing a request for reconsideration pursuant to 37 CFR 1.137(b) on the basis of unintentional delay. A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by (1) The reply required to the outstanding Office action or notice, unless previously filed; (2) The petition fee as set forth in 37 CFR 1.17(m); (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and (4) Any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to paragraph (d) of this section.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (571)273-8300
 Attn: Office of Petitions

Telephone inquiries related to this decision should be directed to the undersigned at 571-272-3207.



Cliff Congo
Petitions Attorney
Office of Petitions

Enc: Change of Correspondence Address (1 page)
 Privacy Act Statement (1 page)
 Copy of July 16, 2007 Office action (9 pages)

cc: Wayne Arden
 PO Box 16008
 Golden CO 80402-6001



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/757,730	01/13/2004	Wayne R. Arden	2017	4881

24264 7590 07/16/2007
MARTIN & HENSON, P.C.
9250 W 5TH AVENUE
SUITE 200
LAKEWOOD, CO 80226

EXAMINER

PATEL, TARLA R

ART UNIT	PAPER NUMBER
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3772

MAIL DATE	DELIVERY MODE
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07/16/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

44

Office Action Summary	Application No. 10/757,730	Applicant(s) ARDEN, WAYNE R.	
	Examiner Tarla R. Patel	Art Unit 3772	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.138(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 01 May 2007.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-32 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-32 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 01 May 2007 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Amendment

Amendment to Drawing and Specification filed on 5/1/07 are acknowledged and approved.

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

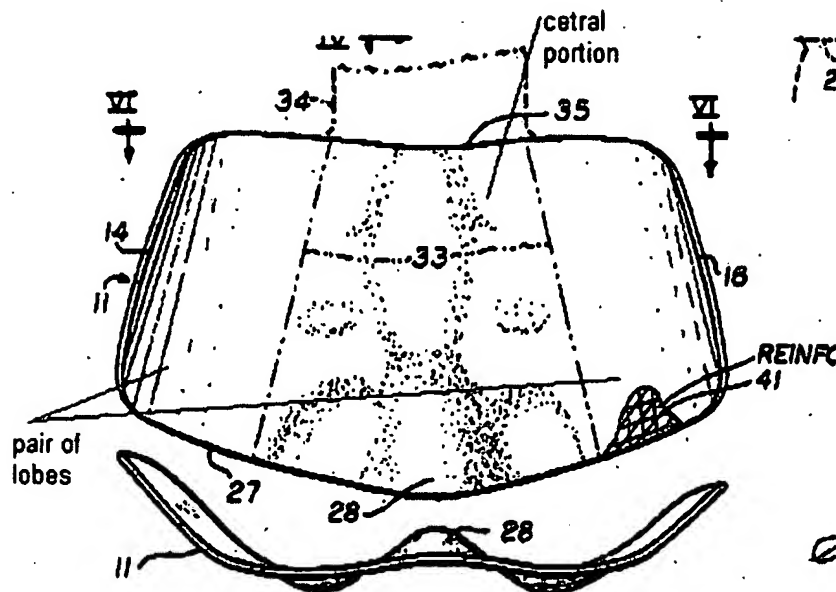
(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claim 1-3, 5-7,9-32 rejected under 35 U.S.C. 103(a) as being unpatentable over Swift (3,434,469) in view of Morrow (6,165,147).

Swift discloses a brace (10) adapted to mount externally of a person's torso in order to support/sheet the person's back, the brace comprises a support piece/sheath (11) including an elongated central portion (28) and a plurality of pairs of oppositely projecting lobe portions (14,16 and column 3 lines 26-44) extending laterally of said central portion, said lobe portions constructed of a stiff yet bendable material (column 4, lines 49-54), and a support band (10) sized and adapted to encircle the person's torso and operative to releasably secure said support piece alongside the person's

back when in a mounted state (see fig 1), said support band constructed of a flexible material (column 4 lines 14-18) and having opposite end portion provided with cooperative fasteners (18,19) whereby said end portions may be releasably secured together in a fastened state.

With respect to claims 5-6,15-21 and 23-24 Swift discloses sleeves and pouches (13) directly connected. With respect to the limitation of the "sleeve" the examiner interpreted the pockets (13) as sleeves and pouches, since these pockets of Swift are made of flexible, breathable material and a pouch inherently includes an interior portion (inside of pocket, column 3 lines 1-25). With respect to the limitation of the "stretchable material" the examiner interpreted elastic fabric as flexible, breathable material to be made of any group of fabrics consist of non-stretchy fabrics and resilient stretchy fabrics that is required by claim 15. As required by claim 20 pouch and said end portions are formed of a common material (column 3 lines 1-25).



With respect to claim 25, Swift inherently discloses device sheath interior has a periphery contoured to the shape of said support piece (see fig 2).

With respect to claim 22, Swift inherently discloses said fasteners permit size adjustment of said band, since it made of elastic material it is able to stretch.

With respect to claims 7, Swift discloses said sleeves are in parallel spaced relation to one another (see fig 5).

With respect to claims 9 and 27, Swift discloses lobe portions of each said pair extend equidistantly of said central portion (see fig 5).

With respect to claims 10 and 28, Swift discloses said lobe portions being formed by notches located between adjacent ones of said lobe portions (14,16, see fig above).

With respect to claims 11 and 29, Swift discloses at least three pairs of lobe portions, there being a primary lobe portions (central) and two secondary lobe (side lobes) portions, one on either side of said primary pair of lobe portions.

With respect to claims 12 and 30, Swift discloses primary portion (central) is greater than secondary lobe portions (14,16) (see fig 5).

With respect to claims 13 and 31, Swift discloses central portion (see above) is wider than secondary lobe portions (14,16) (see fig 6).

However Swift does not discloses that the device is made of stiff yet bendable material and the pocket to be provided with a releasable pouch closure.

However Morrow teaches a lower back and hip support device having pouch with closure (20) and back support device made of plastic having degree of flexibility (column 3 lines 12-19). At the time invention was made, it would have been obvious to one having ordinary skill in to use the teaching of having pouch closure and plastic having flexibility to the device

of Swift, as taught by Morrow to better fit the device to user's back and close the pouch while in use to avoid slipping of the brace unit from the waistband.

3. Claims 4 and 8 rejected under 35 U.S.C. 103(a) as being unpatentable over Swift and Morrow further in view of Petty-Saphon (5,737,774).

Swift and Morrow substantially discloses the invention as claimed, see rejection to claims 1-3, 5-7, 9-32 above; however, Swift and Morrow do not specifically disclose that said strips extend perpendicularly to central portion and strips of a different width than another strips.

However Petty-Saphon teaches a back support with strips (1) extending perpendicularly to central portion to reduce flexion or extension or simply to make the person feel comfortable and strips are different in width (see figs 1 and 2).

At the time of the invention, it would have been an obvious to one having ordinary skill in the art to modify the device of Swift and Morrow with the strips of Petty-Saphon (element 1) to better support the back brace. With respect to claim 8, the back brace with the strips are of a different width than another of said strips, it would have been obvious to one of

ordinary skill in the art to modify the strips of Swift, Morrow and Petty-Saphon, as a matter of design choice to make the strips of different width, since applicant has not disclosed that strips having same width solves any stated problem or is for any particular purpose and it appears that the invention would perform equally well with strips with different width.

Response to Arguments

4. Applicant's arguments with respect to claims 1-32 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tarla R. Patel whose telephone number is 571-272-3143. The examiner can normally be reached on M-T 6-3.30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patricia Bianco can be reached on 571-272-4940. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

TP

Patricia Bianco
PATRICIA BIANCO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3700

7/9/07

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

CHANGE OF CORRESPONDENCE ADDRESS *Application*

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Application Number

Filing Date

First Named Inventor

Art Unit

Examiner Name

Attorney Docket Number

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I am the:

- ☐ Applicant/Inventor
- ☐ Assignee of record of the entire interest.
Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96).
- ☐ Attorney or agent of record. Registration Number _____
- ☐ Registered practitioner named in the application transmittal letter in an application without an executed oath or declaration. See 37 CFR 1.33(a)(1). Registration Number _____

Signature

 Typed or Printed
Name

Date

Telephone

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☐ *Total of _____ forms are submitted.

This collection of information is required by 37 CFR 1.33. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 3 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

Privacy Act Statement

The **Privacy Act of 1974 (P.L. 93-579)** requires that you be given certain information in connection with your submission of the attached form related to a patent application or patent. Accordingly, pursuant to the requirements of the Act, please be advised that: (1) the general authority for the collection of this information is 35 U.S.C. 2(b)(2); (2) furnishing of the information solicited is voluntary; and (3) the principal purpose for which the information is used by the U.S. Patent and Trademark Office is to process and/or examine your submission related to a patent application or patent. If you do not furnish the requested information, the U.S. Patent and Trademark Office may not be able to process and/or examine your submission, which may result in termination of proceedings or abandonment of the application or expiration of the patent.

The information provided by you in this form will be subject to the following routine uses:

1. The information on this form will be treated confidentially to the extent allowed under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a). Records from this system of records may be disclosed to the Department of Justice to determine whether disclosure of these records is required by the Freedom of Information Act.
2. A record from this system of records may be disclosed, as a routine use, in the course of presenting evidence to a court, magistrate, or administrative tribunal, including disclosures to opposing counsel in the course of settlement negotiations.
3. A record in this system of records may be disclosed, as a routine use, to a Member of Congress submitting a request involving an individual, to whom the record pertains, when the individual has requested assistance from the Member with respect to the subject matter of the record.
4. A record in this system of records may be disclosed, as a routine use, to a contractor of the Agency having need for the information in order to perform a contract. Recipients of information shall be required to comply with the requirements of the Privacy Act of 1974, as amended, pursuant to 5 U.S.C. 552a(m).
5. A record related to an International Application filed under the Patent Cooperation Treaty in this system of records may be disclosed, as a routine use, to the International Bureau of the World Intellectual Property Organization, pursuant to the Patent Cooperation Treaty.
6. A record in this system of records may be disclosed, as a routine use, to another federal agency for purposes of National Security review (35 U.S.C. 181) and for review pursuant to the Atomic Energy Act (42 U.S.C. 218(c)).
7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.
8. A record from this system of records may be disclosed, as a routine use, to the public after either publication of the application pursuant to 35 U.S.C. 122(b) or issuance of a patent pursuant to 35 U.S.C. 151. Further, a record may be disclosed, subject to the limitations of 37 CFR 1.14, as a routine use, to the public if the record was filed in an application which became abandoned or in which the proceedings were terminated and which application is referenced by either a published application, an application open to public inspection or an issued patent.
9. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local law enforcement agency, if the USPTO becomes aware of a violation or potential violation of law or regulation.